

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of))	
Inquiry Concerning High-Speed Access to the))	GN Docket No. 00-815
Internet Over Cable and Other Facilities))	
Appropriate Regulatory Treatment for Broadband))	CC Docket No. 02-52
Access to the Internet Over Cable Facilities))	

**COMMENTS OF THE DISTRICT OF COLUMBIA OFFICE OF CABLE TELEVISION
& TELECOMMUNICATIONS**

I. Introduction

The District of Columbia Government Office of Cable Television and Telecommunications ("District") submits the following comments to the Federal Communications Commission ("FCC") in response to the Declaratory Ruling and Notice of Proposed Rulemaking ("NPRM") issued by the FCC regarding the regulatory classification of cable modem service.¹ In its Declaratory Ruling, the FCC classified cable modem service as an information service under Title I of the Communications Act of 1934, with the intention that cable modem service should be largely unregulated at either the federal, state, or local levels. In the NPRM, the FCC seeks comment on the regulatory implications of its finding that cable modem service is an information service, including, among other things, the extent to which state

¹ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77 (March 15, 2002) ("NPRM").

and local authorities may regulate the service.² The District asserts that despite the classification of cable modem service as an information service, pursuant to Title I of the Communications Act³, cable modem service should be treated and regulated at the local level similar to a cable service.

The District shares the FCC's goal of ensuring that residents have timely access to an advanced telecommunications infrastructure without creating unnecessary regulatory barriers. The District further understands the FCC's concern regarding regulatory parity between facilities-based providers of cable modem service. However, it should be clear that the District and other local governments encourage the development of competitive services and universal availability of access to high-speed networks for all residents. In fact, local governments actively encourage companies to come to communities and to provide advanced Internet service.

While respectful of the FCC's intent to encourage development of new advanced services to the benefit of consumers, the District questions the classification of cable modem service as an information service and the appropriateness of separating cable modem service from the local franchise authorities that have historically regulated cable companies. Any separation of cable modem service from the local regulation of cable service only benefits the cable operators, not the consumers. The short and long term effects of local authority limitations over aspects of cable modem service will lead to consumer confusion and undue administrative burdens upon local communities. Local oversight should not be seen merely as an obstacle to cable modem development. After all, cable providers have had little problems in providing modem service in the current regulatory environment. Rather, local governments, like the District, ensure that

² See NPRM at ¶ 8.

³ The Communications Act of 1934, 47 U.S.C. 153 (20).

services are provided to all residents in a logical, orderly manner without causing undue burdens on citizens.

In its discussion, the District focuses its comments upon local authority to oversee customer service and public rights-of-way issues. The District also responds to the FCC's request for comments regarding local government's authority to collect franchise fees for cable modem service. The District concludes that it and other local governments cannot be limited in the management of their rights-of-way. Local governments provide the best mechanisms for ensuring customer service and are entitled to receive just compensation for the rental of public space through franchise fees.

II. Classification of Cable Modem as Information Service.

In order to respond to the NPRM, it is important to understand the FCC's Declaratory Order and its classification of cable modem service. The FCC concluded that Internet access service is appropriately classified as an information service, because the provider offers a single, integrated service, Internet access, to the subscriber.⁴ Further, the FCC concludes that the classification of cable modem service turns on the nature of the functions that the end user is offered. Because the FCC finds that "cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications", it concluded that cable modem service should be an information service⁵.

According to the FCC, cable modem service should be distinguished from cable service through an analysis of the definition of "cable service" from the Cable Act.⁶ Although the FCC

⁴ See NPRM at ¶ 36.

⁵ Id. at ¶ 38; See also at ¶ 59.

⁶ Id. at ¶ 60.

acknowledges that cable operators were working on non-video, two-way cable operations as early as 1984⁷, it restricts the interpretation of cable services to actual video programming and interactions that affect the programming.⁸ As part of the distinction, the FCC turns to the definition of “other programming service,” which includes services that a cable operator makes available to all subscribers generally.⁹ Further, the FCC concludes that cable modem service does not fit within the concept of subscriber interaction because of the lack of control the cable operator has over the content.¹⁰

The District believes that the FCC’s conclusion is incorrect and that cable modem service should be classified as cable service.¹¹ To make the connection between cable modem service and information service, the FCC noted the similar function of cable modem Internet service with other types of Internet service.¹² By that same logic, the functions of cable modem service cannot be separated from cable service as it operates within local jurisdictions. To provide cable modem service, facilities must be built along much of the same conduit and pole attachment of cable networks. The service occupies optical transmission nodes and power supply units along cable service networks. Importantly, cable modem service is installed by the same technicians during the same appointments as those for cable service. The phone calls regarding cable modem customer service are handled by the same customer service representatives within the same call center facilities as those for cable service. Currently, modem service is marketed as a package along with cable television service and is provided at discounted rates when combined.¹³

⁷ Id. at ¶ 61.

⁸ See NPRM at ¶¶ 62-68.

⁹ Id. at ¶ 63.

¹⁰ Id. at ¶ 64. It should be noted that typically a cable operator has no control over programming content on a programming network unless the operator owns the programming network.

¹¹ See NPRM, Dissenting Statement of Commissioner Micheal J. Copps.

¹² Id. at ¶ 10.

¹³ For example, Starpower Communication, LLC, an Open Video System provider in the District offers discounts to subscriber that order cable modem services along with other services, such as cable television.

These examples demonstrate that cable modem service is consistent with franchised cable service and should be regulated similarly.

If cable modem service cannot be classified as cable service, it should, at least, be regulated by local governments like cable service due to its similar operations and facilities. As analyzed below, the classification can have a great impact upon rights-of-way management, customer service and franchise fees.

III. Effect upon ROW Management

The FCC requests comment on how its classification of cable modem service as an interstate information service impacts rights-of-way and franchising issues. It notes that the Cable Act authorizes local franchising authorities to require cable operators to obtain a franchise to construct a cable system over public rights-of-way.¹⁴ However, the FCC concludes that once a cable operator has obtained a franchise for such a cable system, the information service classification should not affect the rights of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service. The District disagrees with the FCC's tentative conclusion. The treatment of cable modem service like cable, in this context, is very important in the management of rights-of-way.

The FCC's tentative conclusion would give cable modem service a free ride on cable networks. The FCC here strips the regulation of cable modem service from local governments by classifying it as an information service as opposed to a cable service. Then the FCC would allow the cable modem to be attached to the cable network without any separate franchise,

¹⁴ 47 U.S.C. §541(a)(2).

regulation or approval because it is a part of a cable operator's cable service operations. Clearly, this would give the cable operator protection under the Title VI, cable television rules. Therefore, a cable modem provider, would experience of the protections of a cable operator, without also experiencing any of the costs of other communications providers. Frankly, the FCC conclusion would allow cable modem providers to benefit in two ways, allowing operators to "have its cake and eat it too". This conclusion would be very expedient for cable operators but would create regulatory chaos for local governments.

The cable modem providers and the FCC cannot "have it both ways." If cable modem service is an information service that uses a local government's public's rights-of-way, the government should be entitled to approve its installation separately, like any other service. If the District must provide access to customers through a cable franchise, then cable modem service must be reviewed as a part of the cable franchising process, even if it classified as an information service. The FCC's current decision would open the door for other rights-of-way users to claim that they should be able use public property without local governmental review. If anything, the FCC's conclusion only illustrates further the need to regulate cable modem service like a cable service because of the fusion with typical cable services.

A. Impact upon Private Property

The impact of the FCC's conclusion could also create confusion for consumers and property owners. While the impact to the District's public rights-of-way is unknown at this time, the FCC's conclusion does raise the question not only of access to the public rights-of-way for the provision of cable modem services, but also of access to private property through contracts and easements that are tied to the provision of cable service. Consumers in some jurisdictions have the option of accessing cable modem service only, without subscribing to cable television

service. In such cases, if cable modem service is no longer governed by the franchise agreement or the Cable Act, the franchising authority would be uncertain about the validity of easements crossing private property negotiated for the provision of cable service and of the cable modem operator's accountability.

B. Different Treatment for Cable Modem Providers

The FCC also seeks comment generally on the scope of local franchising authority over facilities-based providers of information services. The FCC asks if there is any basis for treating facilities-based providers of information services differently based on the facilities used.¹⁵ Different treatment of the cable modem provider would occur in the District if the FCC adopts its decision. The District does not have any specific rules regarding the franchising of information services. However, the District has different rights-of-way rental compensation and occupation rules to apply to non-cable occupants.¹⁶ These operators pay compensation on a per-foot basis. The District's ability to receive proper compensation for the use of public facilities would be confused because the District would have to classify the actual use of facilities and would have to apply to different compensation models to similar facilities.

C. Local Franchising as a Barrier to Entry

In the NPRM, the FCC restated its belief that "administration of the public rights-of-way should not be used to undermine efforts of either cable or telecommunications providers to upgrade or build new facilities to provide a broad array of new communications services."¹⁷ The District wholly agrees with the FCC's belief. However, in order to ensure that the FCC's vision of high-speed service access is fulfilled, it must allow local governments to govern their rights-

¹⁵ See NPRM at ¶ 103.

¹⁶ See 24 DCMR 3300 *et. seq.*

of-way.

Nevertheless, it is important to note that local governments have *not* been barriers to the provision of cable modem service. It is tempting to view local governments as impediments to the provision of high-speed service, but no general proof supports that position. Contrary to creating a barrier to deployment of cable modem service, local franchise agreements foster the *growth* of cable modem service. The cable industry itself, until the recently, supported cable modem service as a cable service and has been successful in deploying it to close to 10 million customers.¹⁸ In fact, the District and other local governments have encouraged the development of networks that can provide cable modem service. Cable modem service could not have been successfully built without franchises.

Indeed, franchise agreements protect the process of providing high-speed Internet service to subscribers on a timely basis. Franchises allow the quicker implementation of service by working with cable operators to set deadlines for constructing upgraded networks. Franchises also can protect subscribers by proscribing a clear process of operations if the cable operator becomes bankrupt. Local government oversight does not slow down of cable modem services; it merely seeks certain protections.

IV. Additional Burdens upon ROW

The FCC also seeks comment on whether providing additional services over upgraded cable facilities impose additional burdens on the public rights-of-way such that the existing franchise process is inadequate. The FCC tentatively concludes that Title VI does not provide a basis for a

¹⁷ Para 104.

¹⁸ According to National Cable Television Association statistics, as of December 31, 2001, available at <http://204.29.171.80/framer/navigation.asp?charset=utf-8&cc=US&frameid=1565&lc=en-us&providerid=113&realname=National+Cable+Television+Association&uid=1732559&url=http%3A%2F2Fwww.ncta.com>.

local franchising authority to impose an additional franchise on a cable operator that provides cable modem service.

Cable modem service does create an additional burden upon the public rights-of-way. Cable modem service would require additional space within public conduits. Further, the upgrades of systems to allow cable modem service have required the installation of larger equipment within communities. Optical transmission nodes and newer power supply backup devices occupy more public space. If public space is occupied, proportional rent should be paid to the local governments to compensate for the additional burden.

The District would like to avoid making separate franchises for cable modem service. Establishing additional franchises would be a burden for cable operators and local governments. It could certainly slow down the deployment of cable-modem service. However, if the FCC excludes cable modem from oversight by cable franchises, local governments would have no choice but to consider additional franchises or other rights-of-way licenses.

V. Application of Customer Service Standards

In the NPRM, the FCC seeks comment on how the information service classification may affect other aspects of state or local regulation, such as consumer protection and customer service standards regarding cable modem service. The FCC goes on to ask whether the authority conferred on franchising authorities by section 632(a) of the Communications Act to establish and enforce customer service requirements applies to cable modem service provided by a cable operator.¹⁹ The District concludes that such federal rules for customer service should apply. Indeed, the District has great concern that its authority to impose consumer protection requirements pursuant to section 632 of the Communications Act would be diminished if the

¹⁹ See Communications Act § 632(a), 47 U.S.C. § 552(a).

FCC fails to apply its customer service standards to cable modem service.

A. Federal Customer Service Rules Should Apply to Cable Modem Service

The District believes that local franchise regulations and enforcement should continue to apply to cable modem service provided by the franchised cable operator, even as such service is classified as an information service. Even if cable modem service is called an "information service," it should not be cut off from the cable franchise and local regulatory oversight of the cable operator. Every day, consumers turn to local governments for the resolution of customer service issues for cable modem service. Because this cable modem service currently comes through the cable franchising process and because the facilities are shared, subscribers expect local governments to be accountable for cable modem service problems and insufficient service.

The federal customer service standards are a good example of a set of regulations that apply to the cable operator and should continue to apply even if cable modem service is redefined as an information service. During the early years of cable television, an attempt at voluntary industry guidelines established by the NCTA failed to remedy customer service problems. As a result, based on the industry's voluntary guidelines, Congress created customer service standards for cable television operators in the 1992 Cable Act. The FCC used its regulatory authority to define specific minimum standards related to telephone availability, trained company representation, telephone answering time, customer service and bill payment locations, installation and service interruption scheduling standards, and other obligations to the consumer.²⁰

Current FCC reports show that customer service complaints continue to be a problem. In its most recent report on consumer complaints and inquiries, the FCC found that billing and rate

²⁰ See Communications Act § 632(b), 47 U.S.C. § 552(b).

complaints continue to head the list of consumer complaints for telecommunications and cable services.²¹ The FCC acknowledges in its report that local cable franchise authorities receive the bulk of cable-related complaints, including cable modem complaints.²² Even after the establishments of the federal regulations, the District of Columbia's operators have failed to meet the federal standards established by the cable industry.²³ In 2001, the District received over 700 customer complaints.

Cable modem service uses the same cable facilities, billing system, and often the same customer service center as other cable services, so it makes sense to continue to apply customer service standards to the cable operator for both services. In fact, customer service for cable modem service can affect customer service for cable services. It would be difficult to make a case that cable customers should have the benefit of customer service standards for cable television service, but not for cable modem service. Because these performance problems persist and can only be controlled by local oversight, the application of the federal rules to cable modem service is important.

B. The Cable Act Provide Local Governments with Authority to Establish Local Customer Service Rules.

The NPRM asks whether the provisions in section 632(d), which allow state and local governments to enact or enforce any consumer protection law that exceeds federal standards, should extend to cable modem service.²⁴ The District asserts that the Cable Act delegates to the local franchise authority the responsibility for establishing and enforcing "(1) customer service requirements of the cable operator; and (2) construction schedules and other construction-related

²¹ *Quarterly Report on Informal Consumer Complaints and Inquiries Received*, Consumer and Governmental Affairs Bureau, May 7, 2002, available at: <http://www.fcc.gov/Bureaus/CGB/Reports/cy2002q1.pdf>.

²² *Id.*

²³ Customer service problems in the District were so severe that it contributed to a substantial cash settlement from AT&T during the transfer of the system to Comcast in January 2000.

²⁴ See Communications Act § 632(d), 47 U.S.C. § 552(d)(1), (2); see also 47 C.F.R. §§ 76.309, 76.1602, 76.1603.

requirements, including construction-related performance requirements, of the cable operator."²⁵ Unless the FCC extends customer service and consumer protection standards to cable modem service, the District will be able to exercise its authority over cable facilities for the provision of cable television, but not cable modem service.

The District believes that enforcing local rules will best meet community needs. The District has the authority to adopt customer service rules through its local ordinance²⁶ and has currently proposed customer service rules.²⁷

Possessing customer service authority over cable modem service is important for local governments because to do otherwise would place the interests of subscribers in limbo. It should be noted that local governments are in better position to ensure that Cable modem reaches the end-user. The FCC is not in the position to ensure that consumer needs are met. The FCC neither has the time nor the resources to assist on an individual basis millions of cable modem subscribers. Subscribers will ultimately call upon local governments. Therefore, this should be delegated at the outset to local governments, as it can ensure efficient resolution to all subscribers.

VI. Application of Franchise Fees

The FCC seeks comment regarding local franchise authority to collect franchise fees for cable modem service. As noted by the FCC, franchising authorities have expressed concern that their rights to collect franchise fees on cable modem service for the use of public rights-of-way would be affected if it were to find that cable modem service is not a cable service.²⁸ The District is very concerned and disappointed by the FCC's tentative conclusion that franchise fees should

²⁵ See Communications Act § 632(a), 47 U.S.C. § 552(a).

²⁶ Sections 7 and 33 of the Cable Television Communications Act of 1981 (D.C. Law 4-142, D.C. Official Code §34-1206(c), §34-1232(2001)).

²⁷ 49 DCR 2903.

not apply to cable modem service because cable modem it is an information service and that revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined. The District is also concerned about the FCC's tentative conclusion that Title VI does not provide an independent basis of authority for assessing franchise fees with respect to cable modem service.

Despite the FCC's conclusion that cable modem service is an information service, it should require that franchise fees be paid to local governments for cable modem service. The FCC must follow the same principle that it followed in establishing the Cable Act, that local governments have the right to recover cost for the rental and use of the public rights-of-way. Cable modem service facilities in many cases occupy the same space as cable service facilities. In other cases, cable modem service requires its own facilities. Regardless of classification, because the operators occupy public space, local governments are entitled to just compensation for the use of such space. In addition, if the FCC would block franchising authorities from obtaining franchise fees for cable modem service, the FCC's actions may also constitute eminent domain action and a taking that would require just compensation.

The FCC must also remember that in addition to occupying a valuable public resource, cable modem providers create a burden upon local governments. If local governments have to resolve customer service issues and street repairs without franchise fees, this decision would equal an unfunded mandate.

Because of the close relationship between cable modem service and cable operators, it would be most efficient for local governments to receive franchise fees, like a cable provider. If the FCC refuses to allow local governments to recoup rights-of-way rent through franchise fee

²⁸ See NPRM at ¶ 105..

compensation, it would inadvertently create a barrier to cable modem operators. Local governments would have to redevelop their regulatory schemes to recover just compensation. The redevelopment of local regulations may affect the operations of other utilities. The overall effect would be delay to cable modem providers as the local governments create new rules.

Without adequate compensation from cable modem providers, governments would not be able to cover the costs of street construction or repairs that result from the use of public rights-of-way. The local budget of most jurisdictions cannot withstand increased infrastructure costs to repair streets. The increased need of local governments to repair streets due to cable modem service could mean greater tax burdens to residents. This results in increased taxes or shifting of funds from other important budgeted priorities.

Franchise fees should not increase Congress' concerns regarding taxes regarding new taxes on Internet access imposed for the purpose of generating revenues when no specific privilege, service, or benefit is conferred and its concern regarding multiple or discriminatory taxes on electronic commerce. The FCC acknowledges that Congress does not consider franchise to be a tax.²⁹ Franchise fees would not be a tax on Internet access, merely compensation for the use of public rights-of-way. By allowing the collection of franchise fees, local governments would have no need to impose new taxes. Even if local governments did impose a tax, a distinction should be drawn between taxes for the installation of facilities and the Internet service itself.

VII. Conclusion

Clearly, the reclassification of cable modem service as an information service creates great challenges. In conclusion, the District has presented comments on three issues raised in the

²⁹ Id.

FCC's NPRM on cable modem services: 1) the District maintains that provision of cable modem service by cable companies causes continuing use of the public rights-of-way, and its removal from the Cable Act or the franchise agreement may have repercussions not only on management of the public rights-of-way, but also on contract negotiations for cable services to access private easements and the ubiquitous provision of cable modem service to residents; 2) the District recommends that the FCC apply customer service standards created by the Cable Act of 1992 to cable modem service provided by cable operators. In so doing, the FCC would maintain the integrity of current provisions that are necessary and relevant to cable operators and consumers; and 3) the District recommends that local governments should be justly compensated for the use of public infrastructure.

In considering the FCC's classification of cable modem service as an unregulated information service, the District urges the FCC to reconsider its initial conclusion to sever cable modem service from the terms of the local franchise management, where it has been regulated until now with success and a lack of complaint from cable companies. Indeed, local authorities and cable operators have worked together successfully to upgrade cable infrastructure and to provide access to advanced services such as cable modem service to all cable customers. Stripping local authority does not speed service to all residents; rather, it will only frustrate consumers.

Respectfully submitted,

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